



1 3993 Howard Hughes Parkway, Suite 600  
 2 Las Vegas, NV 89169-5996  
 3 Facsimile (702) 949-8321  
 4 Telephone (702) 949-8320

5 Robert M. Charles, Jr. NV State Bar No. 006593  
 6 Email: rcharles@lrlaw.com  
 7 John Hinderaker AZ State Bar No. 018024  
 8 Email: jhinderaker@lrlaw.com  
 Marvin Ruth NV State Bar No. 10979  
 Email: mruth@lrlaw.com

9 Attorneys for USACM Liquidating Trust

10 **UNITED STATES BANKRUPTCY COURT**  
 11 **DISTRICT OF NEVADA**

12 In re:

13 USA COMMERCIAL MORTGAGE  
 14 COMPANY,

15 Debtor.

16 Case No. BK-S-06-10725-LBR

17 Chapter 11

18 **FIFTH OMNIBUS OBJECTION OF**  
 19 **USACM TRUST TO PROOFS OF**  
 20 **CLAIM BASED IN WHOLE OR IN**  
 21 **PART UPON INVESTMENT IN THE**  
 22 **MOUNTAIN HOUSE LOAN**

23 **Date of Hearing: July 26, 2011**  
 24 **Time of Hearing: 1:30 p.m.**  
 25 **Estimated Time for hearing: 10 min.**

26 The USACM Liquidating Trust (the "USACM Trust") moves this Court, pursuant to § 502 of title 11 of the United States Bankruptcy Code (the "Bankruptcy Code") and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for an order disallowing in part the Proofs of Claim listed in **Exhibit A**. These claims were filed by investors ("Direct Lenders") against USA Commercial Mortgage Company ("USACM") based upon investments in multiple loans, including an investment in a loan to Pegasus-MH Ventures I, LLC (the "Borrower"). This loan was sometimes referred to as the "Mountain House Loan" and that is how the USACM Trust will refer to it here. This Objection is supported by the Court's record and the Declarations of Geoffrey L. Berman and Edward M. Burr in Support of Omnibus Objections to Proofs of Claim Based



1 Upon the Investment in the Mountain House Loan. (the "Berman Decl." and "Burr  
2 Decl.").

3 THIS OBJECTION DOES NOT RELATE TO AND WILL NOT IMPACT THE  
4 DIRECT LENDERS' RIGHTS TO REPAYMENT ON THE MOUNTAIN HOUSE  
5 LOAN, SHARE IN ANY PROCEEDS GENERATED FROM THE SALE OF THE  
6 REAL PROPERTY SECURING THE MOUNTAIN HOUSE LOAN OR SHARE IN THE  
7 RECOVERY OF ANY FUNDS FROM THE GUARANTOR FOR THE LOAN.

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I. BACKGROUND FACTS**

10 **a. The USACM Bankruptcy**

11 On April 13, 2006 ("Petition Date"), USACM filed a voluntary petition for relief  
12 under chapter 11 of the Bankruptcy Code. Debtor continued to operate its business as  
13 debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.  
14 Debtor's post-petition management of the Debtor was under the direction of Thomas J.  
15 Allison of Mesirow Financial Interim Management, LLC, who served as the Chief  
16 Restructuring Officer.

17 USACM was a Nevada corporation that, prior to the Petition Date, was in the  
18 business of underwriting, originating, brokering, funding and servicing commercial loans  
19 primarily secured by real estate, both on behalf of investors and for its own account. That  
20 business included the solicitation of investors to purchase fractional interest in loans that  
21 USACM originated and then serviced. These investors are referred to as "Direct Lenders"  
22 in USACM's bankruptcy case and in this Objection.

23 On January 8, 2007, this Court entered its Order Confirming the "Debtors' Third  
24 Amended Joint Chapter 11 Plan of Reorganization" as Modified Herein [Docket No.  
25 2376]. As part of the Plan, and pursuant to an Asset Purchase Agreement filed with this  
26 Court, USACM sold the servicing rights to most of the loans it serviced to Compass

1 Partners, LLC and Compass Financial Partners, LLC (“Compass”), including the  
2 Mountain House Loan. The sale to Compass closed on February 16, 2007.

3 The USACM Trust exists as of the Effective Date of the Plan, which was March 12,  
4 2007. Geoffrey L. Berman is the Trustee. Under the Plan, the USACM Trust is the  
5 successor to USACM with respect to standing to seek allowance and disallowance of  
6 Claims under 11 U.S.C. § 502(a).

7 Upon information derived from filings in the United States District Court, District  
8 of Nevada, *3685 San Fernando Lenders Company, LLC, et al v. Compass USA SPE, LLC,*  
9 *et al*, No. 2:07-cv-00892-RCJ-GWF action, the Trust believes that “Silar Advisors, LP  
10 (“Silar”) financed Compass’ acquisition of the Purchased Assets, including the loan  
11 service agreements in the USACM bankruptcy case and took a secured interest in those  
12 Purchased Assets by executing a Master Repurchase Agreement (“Repurchase  
13 Agreement”) with Compass, and by filing a UCC-1 financing statement with the State of  
14 Delaware.” *Id.* Docket 1250 at 13-14 (citations to declarations omitted).

15 Further, from filings in the same action, the Trust believes that “Effective as of  
16 September 26, 2007, Silar foreclosed on Compass through Asset Resolution LLC (“Asset  
17 Resolution”) and took ownership of the Purchased Assets. ... Silar created Asset  
18 Resolution as a ‘single purpose entity,’ conveyed all of its interests in the Repurchase  
19 Agreement to Asset Resolution, and Asset Resolution properly foreclosed on the assets of  
20 Compass, including the Purchased Assets.” (Citations omitted.) Asset Resolution LLC is  
21 now a debtor in a chapter 7 bankruptcy case pending in Nevada, case no. BK-S-09-32824-  
22 RCJ, along with certain affiliates.<sup>1</sup> By Order entered on July 19, 2010 by the Hon. Robert  
23 C. Jones in the Asset Resolution Case, the servicing rights for 19 loans were transferred to  
24

25 <sup>1</sup> 10 90 SPE LLC, Fiesta Stoneridge LLC, CFP Gramercy SPE LLC, Bundy 2.5 Million SPE LLC, CFP  
26 Cornman Toltec SPE LLC, Bundy Five Million LLC, Fox Hills SPE LLC, HFAH Monaco SPE LLC,  
Huntsville SPE LLC, Lake Helen Partners SPE LLC, Ocean Atlantic SPE LLC, CFP, Gess SPE LLC, CFP  
Mountain House SPE LLC, and Shamrock SPE LLC.



1 Cross, FLS. The Mountain House Loan, was among the loans whose servicing rights were  
2 transferred to Cross, FLS.

3 The Trust has attempted to monitor loan collections through monitoring the district  
4 court litigation and the ARC bankruptcy case, but has received limited information  
5 concerning servicing and resolution of direct loans by Compass/Silar/Asset Resolution or  
6 their successors, including the trustee in bankruptcy for Asset Resolution. The Trust's  
7 legal counsel has also contacted Cross FLS about certain loans that it is servicing,  
8 including the Mountain House Loan. The following is the extent of the USACM Trust's  
9 information on the current servicing and status of the Mountain House Loan.

10 **b. The Mountain House Loan**

11 USACM circulated an Offer Sheet to prospective Direct Lenders soliciting funding  
12 for an acquisition and development loan to a borrower identified as "Pegasus-MH  
13 Ventures I, LLC." A copy of the Offer Sheet is attached hereto as **Exhibit B** and  
14 incorporated by this reference. (Berman Decl., ¶ 4.) The total loan amount proposed was  
15 \$9,750,000. The Offer Sheet described the investment as a "First Trust Deed Investment"  
16 and noted that the investment would be secured by a first deed of trust on approximately  
17 40 acres of undeveloped land planned for a residential development located near the  
18 corner of Highway 205 and Mountain House road near Tracy, California. In addition, the  
19 Offer Sheet provided that the investment would be secured by a second deed of trust on  
20 approximately 130 acres of adjacent undeveloped land zoned for commercial  
21 development, with approximately \$5 million in equity. The Offer Sheet further provides a  
22 loan to value percentage of 50%, based on "comparative prices in the area, not including  
23 the additional collateral, which provides additional net equity of \$10,600,000." Pursuant  
24 to the Loan Agreement, the loan was intended to acquire the subject property, and to cover  
25 some pre-development costs.

26

1       On June 10, 2004, Borrower made and delivered to various lenders, including the  
2 Direct Lenders identified in **Exhibit A**, a “Promissory Note Secured by Deed of Trust”  
3 (the “Note”) and a Loan Agreement. (Berman Decl., ¶ 5.) The Note and Loan Agreement  
4 provided for a loan of \$6,960,000, with potential subsequent increases up to \$9,750,000.  
5 The Note was secured by a “Deed of Trust, Assignment of Rents, Security Agreement and  
6 Fixture Filing” from the Borrower in favor of the Direct Lenders that was recorded in the  
7 official records of San Joaquin County, California on July 21, 2004 at Instrument Number  
8 2004-160902, as were subsequent amendments to the Deed of Trust to secure subsequent  
9 advances. Pursuant to the terms of the Deed of Trust, the Direct Lenders’ investment was  
10 secured by a first position lien on what was defined therein as “Parcel 2” and a second  
11 position lien on what was defined as Parcel 1, behind a purchase money deed of trust  
12 recorded concurrently with the Deed of Trust. The Note was also supported by a Guaranty  
13 executed by William Zenklusen and Michael Clevenger on June 10, 2004.

14       The USACM “Loan Summary” dated July 31, 2006 and filed in this case shows  
15 that Borrower was “Performing” on the Note as of July 31, 2006, due to the fact that  
16 sufficient cash was being held by the Disbursing Agent to pay the outstanding interest due.  
17 Pursuant to the February 28, 2007 “Loan Summary” filed in this case, the loan was in  
18 interest default as of February 2007. (Berman Decl., ¶ 6.) During this bankruptcy case  
19 through the transfer of servicing to Compass, USACM treated the Direct Lenders with  
20 respect to any interim payments by the borrower in accordance with this Court’s orders.

21       Counsel for the Trustee has been advised by a representative of Cross, FLS that the  
22 first deed of trust covered a residential area, while the second deed of trust covered a  
23 mixed use business park. The second deed of trust on the business park has been  
24 foreclosed out, leaving only the residential area to secure the loan. The Borrower had  
25 agreed to purchase the loan from the Direct Lenders for \$1.6 million, with the Direct  
26 Lenders voting to accept the offer, but the Borrower was unable to obtain financing. The



1 Direct Lenders are not looking to foreclose on the property. One of the guarantors, passed  
 2 away recently (Mr. Zenklusen), and the other has become insolvent (Mr. Clevenger).

3 **c. The Mountain House Claims**

4 **Exhibit A**, attached, lists Proofs of Claim filed by Direct Lenders that appear to be  
 5 based in part upon an investment in the Mountain House Loan. (Burr Decl. ¶ 7.)

6 **Exhibit A** identifies the Proof of Claim number, the claimant, the claimant's address, the  
 7 total amount of the claim and the total amount of the claim that appears to be related to an  
 8 investment in the Mountain House Loan based upon the information provided by the  
 9 claimant. (Burr Declaration ¶ 7.) The claims listed in **Exhibit A** are referred to  
 10 hereafter as the "Mountain House Claims." As required by Nevada LR 3007, a copy of  
 11 the first page of the proof of claim for each of the claims referenced in **Exhibit A** are  
 12 attached as **Exhibit C**.

13 **II. JURISDICTION**

14 The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 1334 and  
 15 157. Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a core  
 16 proceeding under 28 U.S.C. § 502 and Bankruptcy Rule 3007.

17 The statutory predicates for the relief requested herein are 11 U.S.C. § 502 and  
 18 Bankruptcy Rule 3007.

19 **III. APPLICABLE AUTHORITY**

20 Under the Bankruptcy Code, any Claim for which a proof of claim has been filed  
 21 will be allowed unless a party in interest objects. If a party in interest objects to the proof  
 22 of claim, the Court, after notice and hearing, shall determine the amount of the Claim and  
 23 shall allow the Claim except to the extent that the Claim is "unenforceable against the  
 24 debtor . . . under any . . . applicable law for a reason other than because such claim is  
 25 contingent or unmatured." 11 U.S.C. § 502(b). A properly filed proof of claim is  
 26 presumed valid under Bankruptcy Rule 3001(f). However, once an objection to the proof



1 of claim controverts the presumption, the creditor ultimately bears the burden of  
2 persuasion as to the validity and amount of the claim. *See Ashford v. Consolidated*  
3 *Pioneer Mortg. (In re Consolidated Pioneer Mortg.)*, 178 B.R. 222, 226 (9th Cir. B.A.P.  
4 1995), *aff'd*, 91 F.3d 151 (9th Cir. 1996).

5 **IV. THE OBJECTION**

6 The Mountain House Loan appears to have been a legitimate, arms-length  
7 transaction with a third party borrower. In addition, the Direct Lenders took a known risk  
8 by investing in a promissory note secured by a lien on real property.

9 USACM is not liable for the Borrower's default or any decrease in the value of the  
10 collateral.

11 The Direct Lenders fail to state a claim because USACM does not appear to have  
12 breached the loan servicing agreements with respect to collection of the Mountain House  
13 Loan. USACM was under no duty to foreclose on the collateral securing the Mountain  
14 House Loan or take any other action.

15 This objection will not affect the Direct Lenders' right to be repaid on the Mountain  
16 House Loan by the Borrower or to recover from the sale of any collateral that secured the  
17 Mountain House Loan or on the guarantee supporting the Mountain House Loan.

18 **V. CONCLUSION**

19 The USACM Trust respectfully requests that the Court disallow the claims against  
20 USACM listed in **Exhibit A** to the extent those claims are based upon an investment in the  
21 Mountain House Loan. This objection concerns only claims based upon an investment in  
22 the Mountain House Loan and not any other claims of any of the Direct Lenders. The  
23 USACM Trust also requests such other and further relief as is just and proper.

24

25

26



1 Dated: June 24, 2011

2 LEWIS AND ROCA LLP

3 By s/John Hinderaker (AZ 18024)  
4 Robert M. Charles, Jr., NV 6593  
5 John Hinderaker, AZ 18024 (*pro hac vice*)  
6 Marvin Ruth, NV 10979  
7 3993 Howard Hughes Parkway, Suite 600  
8 Las Vegas, Nevada 89169  
9 E-mail: JHinderaker@lrlaw.com  
10 *Attorneys for the USACM Liquidating Trust*

11 Copy of the foregoing and pertinent  
12 portion of Exhibits mailed by first  
13 class postage prepaid U.S. Mail on  
14 June 24, 2011 to all parties listed on  
15 Exhibit A attached.

16 LEWIS AND ROCA LLP

17 s/ Matt Burns  
18 Matt Burns

19  
20  
21  
22  
23  
24  
25  
26